

WILLARD HERZBERG

IBLA 93-533

Decided June 6, 1995

Appeal from a decision of the Butte Falls Area Manager, Oregon, Bureau of Land Management, determining rental for access road right-of-way OR 36598.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rent–Rights-of-Way: Appraisals–Rights-of-Way: Federal Land Policy and Management Act of 1976

BLM properly establishes the fair market rental value of a road access right-of-way by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c), during the course of a periodic adjustment necessary to reflect the current fair market value. Where an appellant fails to point out error in BLM's determination, the rental assessment will be affirmed.

APPEARANCES: Willard Herzberg, Medford, Oregon, pro se; Lance Nimmo, Butte Falls Area Manager, Medford, Oregon, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Willard Herzberg has appealed from a December 10, 1992, decision of the Butte Falls Area Manager, Oregon, Bureau of Land Management (BLM), determining the appraised fair market rental for road access right-of-way OR 36598.

BLM granted right-of-way OR 36598, embracing 3.455 acres in sec. 32, T. 34 S., R. 3 W., and sec. 5, T. 35 S., R. 3 W., Willamette Meridian, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1988), effective November 30, 1984. The grant described the right-of-way as "[a] nonexclusive right to use the lower approximately 0.95 miles of the May Creek (#35-3-5) BLM road for [i]ngress and egress to a private road to property owned by Mr. Herzberg. No more than 0.95 miles nor a width exceeding 30 feet shall be used under this grant."

On February 15, 1991, BLM issued a decision notifying appellant of "the appraised 5-year rental for your road access." It then stated:

[T]he following is a breakdown of your past [rent] and 5-year rent now due.

11-30-1989 to 12-31-1989	\$ 5.00 [1/]
01-01-1990 to 12-31-1990	58.00
01-01-1991 to 12-31-1995	<u>305.00</u>

Total Rounded Rent Due Through 1995 is \$368.00

The decision required payment within 30 days of its receipt. It also provided for the right of appeal to this Board. The file contains a certified mail return-receipt card signed by Herzberg acknowledging receipt. The record contains no evidence of payment or of any appeal being filed.

In its decision dated December 10, 1992, BLM mentioned that it had previously billed appellant for rent due up through 1995, but stated that "[i]n light of the presently ongoing exchange both you and the United States are involved with regarding the property served by this road access, the rental for your right-of-way has been redetermined to reflect that period of time through 1992." BLM stated that the annual rental had been determined to be \$64 per year. BLM broke down the rent due as \$5 for 1989, \$61 for 1990, \$62 for 1991, and \$64 for 1992. ^{2/} Again, BLM required payment within 30 days of receipt of its decision and informed Herzberg of his right to appeal.

Herzberg filed a timely appeal of the December 1992 decision. On appeal, he asserts that the rental charges are unjustified because under the original grant the "landowner (grantor) had access rights." He states that in 1983, BLM had no objection to his use of the road without charges. He contends that May Creek Road is on his property and other private properties and that property taxes are being assessed for its use. Further, he states that individuals such as hunters use the road to a far greater

^{1/} In regulations published in 1987, the Department announced at 43 CFR 2803.1-2(a) that annual rent billings for rights-of-way would be set or adjusted to coincide with the calendar year. 52 FR 25818 (July 8, 1987).

^{2/} BLM determined the annual rental for 1992 by utilizing the per-acre rental schedule provided for in 43 CFR 2803.1-2(c). The rent for the 3 previous years was calculated by applying a discount factor to the 1992 annual rent. Appellant makes no specific challenge to BLM's methodology in calculating the rental.

extent and should be charged for their use. Finally, he contends that BLM's action is discriminatory in that the charges make it prohibitive for him to travel over a road on his own property, while other users are permitted to travel the road without assessment.

In his response to appellant's statement of reasons, the Butte Falls Area Manager states that the United States obtained perpetual and exclusive rights to May Creek Road through acquisition of easement REM-39 in March 1956, and that while the grantors and their heirs and assigns retained the right to use the road, "Mr. Herzberg is an assign only on that portion of the original premises that he purchased. He is not an assign in the segment of the road between his property and the County road." The Area Manager asserts that the county required appellant to obtain approval from BLM for "a road he was planning to construct intersecting the May Creek Road #35-3-5," as well as for his use of May Creek Road.

The Area Manager states that by letter of January 25, 1983, BLM advised appellant that it had no objection to his use of May Creek Road for casual ingress and egress. Appellant was also advised that approval of casual use did not constitute approval for legal access for purposes of partitioning or subdivision under county zoning ordinances.

The Area Manager notes that appellant is not being singled out, because BLM "is only charging fair market rent for the use of May Creek Road from those individuals who seek legal authorization from the Bureau for their use of the May Creek Road," and he states that BLM would be just as happy to acknowledge appellant's casual use of the road should that be his choice. The Area Manager acknowledges that May Creek Road is intended to be open for general use by the public.

[1] Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1988), provides that the Secretary is authorized to grant a right-of-way over public lands for "roads." In addition, section 504(g) of FLPMA requires that the holder of a FLPMA right-of-way "shall pay annually in advance the fair market value thereof as determined by the Secretary granting * * * such right-of-way." 43 U.S.C. § 1764(g) (1988).

BLM determined the annual rental for appellant's right-of-way according to the regulations at 43 CFR 2803.1-2(c)(1). To compute the annual rental pursuant to this regulation, the acreage subject to the right-of-way is multiplied by the per-acre rental value established for the region (or zone) in which the right-of-way is located. See 43 CFR 2803.1-2(c)(1)(iv).

In his response, the Area Manager discussed and explained the concerns stated in appellant's statement of reasons. Beyond those concerns, the issue in this appeal is simply whether the annual rental charged by BLM constitutes fair market value of the use granted. Whether or not

others pay for use or should be required to pay is not relevant to this appeal. Ruth Tausta-White, 127 IBLA 101, 104 (1993). Appellant challenges the rental as "prohibitive" but provides no evidence that the fee fails to reflect market conditions. As indicated above, the Secretary is obliged to assess fair market value for a right-of-way and BLM determined rental according to the procedure provided by the regulation at 43 CFR 2803.1-2(c)(1). Appellant has shown no error in this determination.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

Will A. Irwin
Administrative Judge